C OF A (CIV) 28/2002

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

ATTORNEY GENERAL N O

APPELLANT

and

MOSES THULO

FIRST RESPONDENT

TOP CHICKEN WHOLESALE (PTY) LTD **SECOND RESPONDENT**

Held at Maseru

CORAM: Steyn P
Ramodibedi J A
Smalberger J A

SUMMARY

Appeal against the grant of absolution in an action for damages - second defendant's truck driven by its employee, first defendant, colliding with plaintiff's helicopter on a parking lot - by agreement only merits proceeded with - issues of negligence raised on the pleadings by plaintiff and defendants and fully canvassed-no contributory negligence or apportionment of damages pleaded - provisions of section 2 (1) (a)of the Apportionment of Damages Order 1970 to be applied as a matter of law if more than one party legally at fault in relation to damage suffered.

Negligence on the part of first defendant proved - defendants failing to discharge onus of proving that plaintiff's helicopter pilot was negligent - Appeal allowed.

JUDGMENT

SMALBERGER J A:

[1] Cases involving a collision between a stationary helicopter and a motor vehicle are no doubt comparatively rare. The present appeal arises from one such instance. On 22 March 1996, in an open parking lot situated just below the offices of the Maputsoe Border Control Post, a truck driven by Mr Thulo ("Thulo"), the first respondent, in the course of his duties as an employee of the second respondent, collided with and damaged one of the main rotor blades of a parked helicopter, owned by the Lesotho Defence Force. The helicopter, piloted by Major Thahane ("Thahane"), had landed there earlier to drop off four immigration officials. The flight was a chartered one (such flights being permitted). The collision occurred as Thulo was negotiating his truck past the stationary helicopter.

[2] Arising from the collision, the appellant, in his capacity as legal representative of the Lesotho Government, instituted action (as plaintiff) against Thulo and the second respondent (as defendants) for damages. The amount presently claimed is M279,374.34. Both the merits and the quantum of the appellant's claim were put in issue on the pleadings. At the pre-trial conference the parties agreed to separate these issues and to proceed to trial, with the consent of the court, on the merits only. The matter proceeded on that basis before Peete J. At the conclusion of the trial the learned judge granted an order of absolution from the instance, with costs, against the appellant. Hence the present appeal. For the sake of convenience I shall refer to the appellant as "the plaintiff" and the respondents as "Thulo" and "the second defendant" (or collectively as "the defendants") as the context requires.

[3] In his particulars of claim the plaintiff pleaded that the collision "was caused by the exclusive negligence of (Thulo)." This was denied by the defendants in their plea. In turn they pleaded that the collision "was caused solely by (Thahane's) negligence in

parking a helicopter on a vehicle parking area without taking the necessary precautions in doing so." Each party therefore put in issue the negligence of, or attributable to, the other party or parties, but on the basis of sole responsibility for the collision. These issues were fully canvassed in evidence. None of the parties specifically raised the issue of contributory negligence and resultant apportionment of damages.

[4] Peete J found Thulo to have been negligent in relation to the collision, but not to have been the sole cause thereof. He held that the onus was on the plaintiff to prove, as pleaded, that Thulo was the sole cause of the collision. As he had failed to do so, the appropriate order was one of absolution. He appears never to have considered the question of apportionment. In this respect he erred.

[5] In terms of section 2 (1) (a) of the Apportionment of Damages Order 53 of 1970

> **"Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage."**

South African authority, based on an identical legislative provision, is clear. Where, as here, respective fault (or attributable fault) is alleged on the part of the claimant and other parties to an action, and the issues of negligence raised are canvassed at the trial, if the claimant and one or more of the parties are found to be at fault, apportionment of liability (and damages) must follow as a matter of law. Apportionment need not specifically be pleaded or claimed for this to occur **(AA MUTUAL INSURANCE ASSOCIATION LTD** v **NOMEKA 1976 (3) SA 45 (A) at 55 B - 56 B).** The correctness of the decision in Nomeka's case has never been called into question and it should be extended to govern the position in Lesotho.

Based on his findings, Peete J. should, therefore, have determined to what extent, if any, Thulo and Thahane were each at fault in relation to the collision, and to have made an appropriate declaratory order. The decision in **MOKOKOANE** v **LESOTHO NATIONAL INSURANCE CO. 1991 - 1996 LLR 735** referred to by Peete J is not in point as fault on the part of the plaintiff in that case appears not to have been raised on the pleadings, and in any event the plaintiff was held solely to blame for the collision.

[6] What needed to be determined in the court below, and what needs to be determined on appeal, is:

(a)Was Thulo negligent in relation to the collision?

(b)If so, was Thahane also negligent?

(c)If both were negligent, to what extent was each at fault in relation to the collision and any resultant damage suffered?

[7] The parking lot on which Thahane landed the helicopter is by-passed on either side by roads to and from Ficksburg. It is separated from these roads by steel barriers extending for the length of the parking area. The area provides parking for an assortment of vehicles, the drivers or occupants of which need to attend to matters at the Border Control Post. The helicopter was parked adjacent and parallel to the road leading to Ficksburg, facing north, i.e towards Ficksburg. To its right (on the eastern side) there was space for vehicles to pass. The helicopter had four rotor blades positioned centrifugally at right angles. When stationary the height of the rotor blades above the ground was 2.54 metres. The rotor blades had a diameter of 9.84 metres and the overall length of the helicopter was approximately 12 metres. The distance between the steel barriers on either side of the parking lot was 15 metres.

[8] The parked helicopter attracted the attention of a large number of inquisitive bystanders who came to look at it. They were mainly confined to the left or western

side of the helicopter, leaving an open space on the right or eastern side for vehicles to pass. Thulo entered the parking lot from the direction of Ficksburg. The parked helicopter and the people milling around it were clearly visible to him. He brought his truck to a stop before he reached the helicopter, apparently amazed at the sight before him. The truck was loaded with a large container. The truck with its load, at its widest, was 2.4 metres. The top of the container was 3.6 metres from the ground. Thulo then proceeded to negotiate his way past the helicopter and in the course of doing so the container came into contact with, and damaged, one of the helicopter's rotor blades. The above facts are common cause.

[9] At an inspection in loco held during the course of the trial, Thahane pointed out the spot where the collision occurred. It was a distance of 5.2 metres from the barrier on the eastern side. His evidence as to the point of impact was not seriously challenged, and there is no reason not to accept it. Thahane testified that before the arrival on the scene of Thulo's truck another, larger mechanical horse and trailer combination had entered the parking lot from the same direction and had been guided by him past the helicopter without mishap. This satisfied him that there was sufficient room available for vehicles to pass the helicopter safely. He further testified that he saw Thulo's truck come to a stop and that he indicated to him that he could pass. At that stage the truck was not yet close to the helicopter. He then moved away and went round the helicopter to the other side. Thulo claimed in evidence that Thahane had actually beckoned to him to pass and that while he was being actively guided past the helicopter by Thahane the collision (which Thulo said he only became aware of afterwards) occurred. It was thus the defendants' case in this regard that Thahane had assumed a measure of responsibility for guiding the truck past the helicopter and was involved in the manoeuvre that led to the collision.

[10] Peete J. correctly found that Thulo had been negligent in relation to the collision. On Thulo's own evidence, the helicopter and its overhanging rotor blades were clearly

visible. He had stopped specifically to look at the helicopter before he proceeded to pass it. He must of necessity have observed its position in relation to his truck. As a reasonable driver he would have been expected to take note of the height of the rotor blades above the ground and have borne in mind the height of the container on his truck. If he had any doubt as to their relationship to one another he could have checked to see what the position was and whether he could proceed in safety. He had 5.2 metres available in which to drive his 2.4 metre wide truck safely past the helicopter. In the circumstances he was clearly at fault in failing to keep a proper lookout and to steer his truck further to the right in order to give the helicopter a sufficiently wide berth to avoid contact with its readily visible rotor blades. Under cross-examination Thulo actually conceded that he was at fault in relation to the collision but contended that blame also attached to Thahane. In the result the plaintiff discharged the issues upon it of proving that Thulo was negligent, a prerequisite for liability on his part and that of second defendant for the damages suffered by the plaintiff. It is not disputed that second defendant is vicariously liable for Thulo's negligence and consequently for any damages suffered by the plaintiff.

[11] It accordingly became incumbent upon the defendants to establish contributory negligence on the part of Thahane in order for them to lay claim to an apportionment of the plaintiff's damages. The question arises whether they discharged the onus upon them in that regard. In my view they failed to do so. It was not negligent per se for Thahane to have landed the helicopter where he did in the circumstances prevailing at the time. It is only if the presence of the helicopter in the parking lot would have constituted a potential danger to other users of the parking lot that Thahane would have been required in law to take reasonable steps to guard against such danger occurring, and a failure to do so would have amounted to negligence on his part. In my view the parked helicopter, at least during the hours of daylight, constituted no such danger. Having regard to its size and the prevailing conditions its presence on the parking lot, and the space it occupied, was clearly discernible to any motorist

keeping a reasonable lookout. There was no need to cordon it off or to provide any warning of its presence, and there was sufficient room for even large vehicles to pass with reasonable ease and safety between it and the barrier on the eastern side.

[12] It may well be that had Thahane beckoned to Thulo to proceed past the helicopter and assumed responsibility for guiding him, as Thulo claimed, he would have been partly responsible for the ensuing collision. But Thahane denies that he did so. Peete J. found himself unable to resolve this conflict of fact, having regard to the evidence and the impressions created by the witnesses. There were no inherent probabilities which assisted him in coming to a conclusion either way. I share his difficulties in that regard. No good reason exists for accepting Thulo's evidence in the above regard as true and that of Thahane as false. Accordingly the onus that rested on the defendants of proving negligence on the part of Thahane has not been discharged (**cf NATIONAL EMPLOYERS MUTUAL GENERAL INSURANCE ASSOCIATION** v **GANY 1931 AD 187 at 199).** It follows that there is no room for the apportionment of any damages suffered by the plaintiff.

[13] It is not entirely clear from his judgment whether Peete J found Thahane to have been negligent in relation to the collision. It may be implicit in his finding that Thulo was not solely to blame for the collision that he considered Thahane to be at fault to some degree. If that is so he erred as, for the reasons given above, the defendants did not discharge the onus upon them of proving negligence on Thahane's part.

[14] In the result the following order is made:

1.The appeal succeeds, with costs.

2.The order of the court *a quo* is set aside and the following is substituted in its stead:

"(a) It is declared that the defendants are liable jointly and severally to

compensate the plaintiff for such damages as the plaintiff proves in due course, or the parties agree upon;

(b) The defendants are to pay the plaintiff's costs of the hearing in relation to the merits jointly and severally;

(c)The matter is to proceed before the court *a quo* in relation to the issue of damages."

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J W SMALBERGER
JUDGE OF APPEAL

I concur

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J H STEYN
PRESIDENT

I concur

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M M RAMODIBEDI
JUDGE OF APPEAL

For the Appellant : Mr. P J Loubser
For the Respondent : Mr. J P L Snyman